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IN THE

Supreme Court of the United States

GANGI BROS. PACKING COMPANY, 7-UP BOTTLING COMPANY OF PHILADELPHIA, INC., 7-UP BOTTLING COMPANY OF SAN FRANCISCO, SOUTHEASTERN SPECIALTY FOODS CORP., TRANS-PACKERS SERVICES CORP., and VARNI BROTHERS CORPORATION, dba SEVEN-UP BOTTLING OF MODESTO, on behalf of themselves and all others similarly situated,

Petitioners,

v.

CARGILL, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Ordinarily, the inferences to be drawn from circumstantial evidence are to be viewed in the light most favorable to the party opposing a motion for summary judgment. *Matsushita Electrical Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) established special rules applicable to summary judgment motions in certain antitrust cases. Where *Matsushita* applies, a defendant may present evidence refuting the adverse inferences that would otherwise be drawn from the circumstantial evidence; those adverse inferences may not then be drawn, and summary judgment may then be granted, unless the plaintiff is able to present evidence that tends to exclude the possibility that the defendant's conduct was the result of non-concerted lawful action. However, in *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992), the Court refused to apply *Matsushita*'s special summary judgment standard where the antitrust claim was not implausible and the defendant's conduct was not inherently procompetitive.

The question presented is whether *Matsushita's* special summary judgment standard applies in cases where (as in *Kodak* but unlike *Matsushita*) the antitrust claim asserted by the plaintiff is neither implausible nor based on conduct by the defendant that is inherently procompetitive.

PARTIES TO THE PROCEEDING

1. Gangi Bros. Packing Company, 7-Up Bottling Company of Philadelphia, Inc., 7-Up Bottling Company of San Francisco, Southeastern Specialty Foods Corp., Trans-Packers Services Corp., and Varni Brothers Corporation, U.S. soft drink bottlers and food processors that purchase citric acid, are the Petitioners here and were the Plaintiffs and class representatives below.

2. Cargill, Inc., a U.S. manufacturer of citric acid, is the Respondent here and was the Defendant below.

3. Archer Daniels Midland Company ("ADM"), Jungbunzlauer International AGL ("JBL"), F. Hoffman-La Roche, Ltd. ("HLR"), Haarman & Reimer Corp. ("H&R"), U.S. and foreign manufacturers of citric acid, were Defendants in the District Court. Plaintiffs' claims against ADM, JBL, HLR and H&R were resolved prior to briefing in the Court of Appeals.

4. Coopers & Lybrand, L.L.P., a non-party in the District Court from which records were sought to be obtained, was made a party to the appeal in the Ninth Circuit on the limited issue of whether it was required to produce documents of an affiliated Swiss entity.

RULE 29.6 DISCLOSURE

None of the Petitioners has a parent company and no publicly held company owns 10% or more of the shares of stock of any Petitioner.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals, as entered on September 1, 1999, is reported at 191 F.3d 1090 and is reprinted in the Appendix at pages A1–A32. The opinion of the Court of Appeals denying rehearing and rehearing *en banc* is reprinted in the Appendix at page A67. The opinion of the District Court granting summary judgment is reported at 996 F. Supp. 951 (N.D. Cal. 1998) and is reprinted in the Appendix at pages A47–A66. The opinion of the District Court granting class certification is reported at 1996 U.S. Dist. LEXIS 16409 (N.D. Cal. Oct. 1, 1996), and is reprinted in the Appendix at pages A33–A46.

JURISDICTION

The opinion of the United States Court of Appeals for the Ninth Circuit was entered on September 1, 1999. App. A1. The Court of Appeals denied Petitioners' timely petitions for rehearing and rehearing *en banc* on October 21, 1999. App. A67. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

This case concerns Section 1 of the Sherman Act, 15 U.S.C. §1 (A69).

STATEMENT OF THE CASE

A. Statement Of Facts.

This case involves an international price-fixing and market allocation conspiracy between domestic and foreign producers of citric acid. Citric acid is used worldwide in foods, beverages, detergents, cleaning products, cosmetics, pharmaceuticals and industrial applications. In the early 1990s, a relatively small number of companies, including ADM, HLR, JBL and H&R, produced most of the citric acid sold commercially throughout the world. In 1996 and 1997, those four producers and their officers pled guilty to participating in an international conspiracy to fix prices and allocate sales volumes of citric acid. Subsequently, the initial four Admitted Conspirators settled civil cases brought by Plaintiffs against them and Cargill.

Cargill did not settle and denied it had ever joined the conspiracy. In the summary judgment motion it filed, it relied heavily on deposition testimony by the CEO of Admitted Conspirators H&R (Hans Hartmann), which it claimed showed there were only four conspirators. While the appeal was pending, however, a fifth citric acid manufacturer, Cerestar, and one of its officers refuted Cargill's "Group of Four" theory by admitting that Cerestar, too, had participated in the conspiracy.

The initial four conspirators admitted participating in the conspiracy from mid-1991 to mid-1995,[1] while Cerestar participated from late 1992 to mid-1994. These "Admitted Conspirators" admitted that "[t]he purpose of the scheme was to restrict the output and raise the price of citric acid in the United States and elsewhere."

The conspirators formed a trade association for European producers (ECAMA), which they used in part as a cover for their conspiratorial activities. Members reported

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[1]The conspiracy ended in June 1995, when the Justice Department announced its investigation.

confidential sales figures to ECAMA, which its Swiss auditors verified through on-site inspections of members' confidential business records. Detailed and accurate information about members' sales was needed to police the market share allocation part of the conspiracy.[2]

Cargill began producing citric acid in 1990. Until mid-1993, it competed with the Admitted Conspirators. It brought new capacity on stream, marketed vigorously, undercut Admitted Conspirators' prices and, by 1993, had earned a 22% market share in the U.S.—all to the Admitted Conspirators' great annoyance. Indeed, its entry into the market in 1990 had caused a price slump. Further, its competitive conduct took market share away from the Admitted Conspirators and put downward pressure on pricing, undermining the conspiracy.

In 1991, the Admitted Conspirators began recruiting Cargill into ECAMA. Although Cargill did not produce citric acid in Europe and thus was not eligible for membership, the Admitted Conspirators changed ECAMA's bylaws to eliminate that obstacle and pressed Cargill to join. Several known conspirators—employees of H&R and HLR who have been identified as participants—recruited Cargill. The recruitment lasted more than a year until finally, in late 1992, Cargill informed ECAMA's Chairman (a major player in the conspiracy) that if the "terms of membership" could be agreed upon, it would join. Thereafter, ECAMA members voted unanimously to invite Cargill to join, and an HLR executive (also a participant in the conspiracy) flew from Europe to the United States for the sole purpose of discussing with Cargill its joinder in ECAMA. Cargill officially joined ECAMA in May, 1993.

Until then, Cargill had been able to compete with the

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[2]Although the auditing firm was part of an international organization (Coopers & Lybrand) with offices in the U.S., it refused to produce its records in response to a subpoena served on its U.S. affiliate. *See* note 4, *infra*.

Admitted Conspirators for market share without substantially eroding the prices set by the conspirators. By the time it decided to join ECAMA, however, the U.S. market had weakened. Chinese producers had entered the market and were expanding their market share and selling at prices far below those set by the conspirators. The Chinese threatened the conspiracy and the high prices it had managed to sustain.

When Cargill joined, ECAMA's entire membership consisted almost entirely of the Admitted Conspirators. ECAMA's Chairman was a high-level participant in the conspiracy. ECAMA meetings were regularly attended by representatives of the Admitted Conspirators, who personally participated in the conspiracy. Price-fixing and sales volume allocation meetings were often held in conjunction with ECAMA meetings.

After announcing it would join ECAMA, Cargill pursued a strategy described in its *own internal documents* as one of "[s]electively compet[ing] at strategic accounts" while generally "[s]upport[ing] industry price increase[s]." It increased its own prices in tandem with the Admitted Conspirators. Cargill also dramatically scaled back its plans to double its U.S. production capacity and abandoned plans to acquire production capacity in Europe. Most telling, Cargill's market share, which until 1993 had risen meteorically, dipped slightly and then remained flat. Cargill attended numerous ECAMA meetings with representatives of the Admitted Conspirators who were key participants in the conspiracy. Cargill provided confidential sales data and submitted to audit by ECAMA's Swiss auditors—a process whose only rational purpose was to facilitate policing of the conspiracy.

In documents from related criminal proceedings that first became available while the appeal was pending, Barrie Cox, an ADM executive deeply involved in the conspiracy, revealed information directly contradicting Cargill's denials that it fixed prices or participated in the conspiracy:

> "Between 1992 and 1995, COX had approximately a dozen conversations with [Cargill National Sales Manager for citric acid] BILL GRUBER of Cargill on what COX called a 'day-to-day level' regarding pricing for specific accounts. . . . In each of these conversations, COX and GRUBER discussed what each would be bidding on particular CA [citric acid] accounts, including, Lever, Schreiber, M&M Mars, Coca-Cola, and P&G (Proctor and Gamble)." (*See* App. A70)

Cox stated that these discussions "usually occurred toward the end of the year when contracts came up for renewal." *Id.* Cargill and ADM "would bid at close to the same price, but not the identical price, as that would look suspicious." *Id.*[3]

Further, Gruber called Cox when Cargill "was considering leading a CA price move . . . to see if ADM would be supportive." *Id.* Cox also admitted that the Admitted Conspirators how to "get messages to Cargill" during the conspiracy period that it should "back off" and "not rock the boat," and that ADM agreed to get the message to Cargill. App. A71. Cox also admitted discussing with Gruber, at a time when the market had "started to flatten out," that each of the companies would have to "'absorb some of the hurt.'" This evidence strongly suggested that, at a minimum, Cargill participated in the conspiracy via communications with Admitted Conspirator ADM.

The Admitted Conspirators viewed Cargill as a member of the conspiracy. An internal document from the files of Admitted Conspirator H&R dated 1994, which expressed

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[3]As the Justice Department officials have observed, a significant feature of the international cartels like those it uncovered in citric acid has been not only agreed upon prices and market share allocations on a world wide and country-by-country basis, but also agreement on "prices to be charged (or bid) to specific customers." Statement of Joel I. Klein on International Antitrust Enforcement before the Subcomm. on Antitrust, Business Rights and Competition of the Senate Comm. on the Judiciary (May 4, 1999) ("Klein Statement").

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concerns that the supply of citric acid was "in significant excess over demand" with resulting "downward pressure on price," stated as an action item that H&R would seek to "gain share at accounts *where [it] has no significant effect on ADM, Cargill, JBL share.*" [redacted] The inference from this evidence was that H&R intended to avoid competing for market share with, and therefore to preserve the agreed-upon volume allocations of, the other conspirators—*including Cargill.*

B. Proceedings Below.

These consolidated civil antitrust class actions were brought in 1995 by Plaintiffs (U.S. soft drink bottlers and food processors that purchase citric acid) against ADM, JBL, HLR, H&R and Cargill—all of which are U.S. or foreign manufacturers of citric acid. Plaintiffs alleged that Defendants engaged in an international conspiracy to fix prices and allocate market share for sales of citric acid, in violation of Section 1 of the Sherman Act. The actions were consolidated by the Judicial Panel for Multidistrict Litigation and assigned to the Northern District of California. The District Court thereafter certified a class. In late 1996, Plaintiffs entered settlements with ADM, HLR, H&R and JBL, which were approved by the District Court.

After these cases were filed, and while an FBI investigation and criminal proceedings focused on the citric acid and related conspiracies were underway but far from complete,[4] Cargill sought summary judgment. It relied on

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[4]Given the pendency of the FBI investigation and criminal proceedings, discovery in this case was fraught with difficulty. The depositions of all but one of the individuals affiliated with the Admitted Conspirators were fruitless because the executives and employees of the Admitted Conspirators asserted the Fifth Amendment privilege against self-incrimination. Further, most of the potential witnesses were located outside of the United States, including the accounting firm that had audited the sales volume data of the ECAMA members and communi-

(continued . . .)

denials by Cargill executives and employees of any participation in the conspiracy and on the deposition testimony of Hans Hartmann (the former President of Admitted Conspirator HLR, who had himself pled guilty) in which he claimed to be unaware of any Cargill presence (or the presence of anyone other than ADM, HLR, H&R and JBL) at conspiratorial meetings and referred to the conspirators as a "group of four."

Relying heavily on Hartmann's testimony about the "group of four" and the lack of "direct evidence that Cargill was involved in [the] conspiracy" (App. A53), the District Court granted Cargill's motion and entered judgment for Cargill. Plaintiffs timely appealed to the United States Court of Appeals for the Ninth Circuit.

While the appeal was pending, there were significant developments in the related criminal proceedings, and both Plaintiffs and Cargill requested that the Court of Appeals take judicial notice of new evidence developed in connection with the criminal cases, which it did. *First*, a fifth manufacturer of citric acid, Cerestar, was indicted and almost immediately pled guilty to criminal price fixing. Cerestar's admission of guilt completely undercut Hartmann's testimony suggesting that the conspiracy was limited to a "group of four" consisting only of ADM, H&R, HLR and JBL. Further, since Hartmann had testified that the latter four were the only companies to send representatives to the price fixing meetings he attended, Cerestar's plea suggested either that Hartmann had lied or that it was possible to participate in the conspiracy while keeping the *appearance* of arms length from it—*i.e.*, through conversations with individual members of the conspiracy rather than attendance at the large group meetings.

(. . . continued)
cated with them about the audit. That firm, which was located in Switzerland, refused to produce any documents, and the District Court and the Ninth Circuit declined to require its U.S. affiliate to obtain and produce the requested information.

Second, in a sentencing memorandum filed with a District Court in Illinois, it was revealed that a high level executive of Admitted Conspirator ADM who was deeply involved in the conspiracy had a series of conversations with Cargill's National Sales Manager for citric acid during the conspiracy period in which the two rigged bid prices for key citric acid accounts and thereby allocated those accounts. *See* pp.4-5, *supra*.

Despite the strong circumstantial evidence of Cargill's participation in the conspiracy, the Ninth Circuit affirmed the grant of summary judgment. In doing so, it relied on *Matsushita* (App. A4-A5), and repeatedly accepted Cargill's proffered explanations for its conduct and for other items of evidence over the reasonable inference of conspiracy that Plaintiffs requested be drawn.[5] Notably, Cargill had no explanation for the price fixing ADM-executive Cox

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[5]*See, e.g.*, App. A14-A15 (rejecting inference that detailed and highly specific data in Cargill's files regarding market shares of its competitors was provided by ECAMA or co-conspirators for policing the volume allocation agreement, in favor of Cargill's unsupported assertion that the data had been generated through its own market research); App. A16-A17 (rejecting inference that Cargill was wooed to and did join *European* trade association (ECAMA)—despite that it never produced or sold citric acid in Europe—in order to join the international conspiracy, in favor of Cargill's contention that it joined because it desired to enter European market); App. A18-A19 (rejecting inference that Cargill scaled back by half its previously publicized plan to expand production of citric acid because it had joined conspiracy and ceased competing for market share, in favor of Cargill's unsupported assertion that it simply changed its mind and decided full expansion would cause price war); App. A19-A22 (rejecting evidence contained in expert report showing Cargill's market share flattened after 1992, in favor of inference from internal H&R memos reporting sporadic incidents of competition by Cargill thereafter that Cargill generally continued to compete for market share); App. A23-A24 (rejecting inference from Admitted Conspirators' price lists found in Cargill's files, including one received on date issued, that Cargill was exchanging price information with other conspirators, in favor of Cargill's assertion that it obtained competitor price lists from customers); App. A24-A25 (rejecting inference from H&R 1994 memo indicating that despite oversupply problem it would not compete with ADM, JBL *or Cargill* that Cargill was viewed as and *was* member of conspiracy, in favor of Cargill's speculative assertion that H&R's reason for not competing with Cargill was its prior lack of success).

admitted he and Cargill's Gruber engaged in, other than to deny that it occurred. Nonetheless, the court dismissed this evidence on the ground that it failed to show that Cargill was part of the "group of four" companies that attended the large group meetings of the Admitted Conspirators and thus was not probative of whether Cargill participated in the industrywide conspiracy. *See* App. A26-A27.

The court declined to apply the rule of an earlier Ninth Circuit case that it was improper on summary judgment to reject circumstantial evidence that supports an inference of conspiracy in favor of explanations suggesting innocent conduct unless drawing the inference of conspiracy would significantly deter beneficial procompetitive conduct. *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litig.*, 906 F.2d 432 (9th Cir. 1990) ("*Petroleum Products*"). The panel dismissed the *Petroleum Products* analysis as "dicta." App. A9-A10.[6]

More importantly, the court failed even to *mention* the *Kodak* decision (*Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451 (1992)), in which this Court similarly held that the *Matsushita* "presumption in favor of summary judgment for the defendant" (504 U.S. at 478), applies only where (a) the plaintiff's evidence consists of conduct by the defendant "that appears always or almost always to enhance competition" (*id.* at 479) and inferring an antitrust violation from it would thus pose "a significant risk of

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[6]The panel's explanation for its rejection of *Petroleum Products*—that its discussion of the treatment of circumstantial evidence in a summary judgment context was dicta—was ill-considered and incorrect. In fact, the *Petroleum Products* court's discussion of the summary judgment standard in a circumstantial evidence case was a considered and detailed holding that it stated was "crucial to a proper resolution of th[at] case" (906 F.2d at 437), as is further evidenced by its comprehensive articulation of the standard (*id.* at 437-41) and its application of that standard to the evidence before it (*id.* at 441-65). The refusal of the panel to follow *Petroleum Products* violated the Ninth Circuit's rule that where a panel wishes to depart from prior Circuit precedent it must call for an en banc review. *Atonio v. Wards Cove Packing Co.*, 810 F.2d 1477, 1478-79 (9th Cir. 1987) (en banc).

deterring procompetitive conduct" (*id.* at 478), and (b) the plaintiffs' theory "ma[kes] no practical sense, [is] 'speculative,' and [is] not 'reasonable.'" *Id.* at 468.

In their Petition for Rehearing and Suggestion for Rehearing En Banc, Plaintiffs pointed out the Court's failure to consider *Kodak* and its application of a summary judgment standard that is inconsistent with the one prescribed by this Court in *Kodak*.[7] The Ninth Circuit panel finally addressed *Kodak*, but gave it short shrift. The panel purported to distinguish *Kodak* as relating to "tying and market power" and not "the sufficiency of evidence of conspiratorial acts alleged under §1 of the Sherman Act." App. A68. The petition for rehearing and rehearing en banc were thus summarily denied. *Id.*

REASONS FOR GRANTING THE PETITION

In *Matsushita*, the plaintiffs asserted a decades long predatory pricing conspiracy that the Court found was "economically senseless"; moreover, they sought an inference of conspiracy from inherently procompetitive activities such as price cutting and rebates. In that context, this Court held that the defendants were entitled to summary judgment unless the plaintiff "present[ed] evidence that `tend[ed] to exclude the possibility' that the alleged conspirators acted independently." 475 U.S. at 588, 597-98. *Matsushita* did not decide whether the summary judgment burden it articulated applied in all antitrust cases or only in those cases in which the plaintiffs' theory was "implausible" and the requested inferences of unlawful conduct were predicated on inherently procompetitive conduct. Six years later, in *Kodak*, this Court answered that question, holding that the "presumption in favor of summary judgment" *Matsushita* applied only

[7]Plaintiffs had previously cited *Kodak* in both their opening and reply briefs.

governs antitrust cases in which the theory alleged is implausible and the inferences sought to be drawn are based on procompetitive conduct, and that absent such circumstances the ordinary summary judgment rules apply. 504 U.S. at 467-71, 478-79.

It is uniformly agreed that in cases like *Matsushita*—that is, in which the defendants lack a rational motive to violate the antitrust laws or for other reasons the plaintiffs' antitrust theory is implausible (475 U.S. at 587) and the inference of unlawful conduct is based on activities that are inherently procompetitive (*id.* at 594)—the plaintiffs "must come forward with more persuasive evidence to support their claim than would otherwise be necessary." *Id.* at 587, 593. However, there remains a profound split among the lower courts as to whether, in cases where the antitrust theory asserted *is* plausible and the activities challenged are facially *anti*competitive, ordinary summary judgment standards apply.[8] *Kodak* should have ended this discussion, for it resolved that question in the affirmative: it held that a defendant in an antitrust case "bears a substantial burden" and must demonstrate that an inference of unlawful conduct is "unreasonable" to obtain summary judgment. 504 U.S. at 469. It further held that when the preconditions of *Matsushita* are not met, ordinary summary judgment standards govern. *Id.* at 468-70.

The Seventh and Third Circuits have faithfully applied *Kodak*, employing ordinary summary judgment standards in all antitrust cases except those based on "economically senseless" theories and procompetitive conduct. The Ninth

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[8]Commentators have noted the confusion in the lower courts regarding the summary judgment standard applicable in antitrust cases. *See, e.g.*, *The Supreme Court: Leading Cases*, 106 HARV. L. REV. 163, 328, 337 (1992); McQueen, *Comment: The Summary Judgment Standard in Antitrust Conspiracy Cases and In re Travel Agency Commission Antitrust Litigation*, 62 J. AIR. L. & COM. 1155, 1157, 1172, 1174, 1193-94 (1997); Hughes, *The Left Side of Antitrust: What Fairness Means and Why It Matters*, 77 MARQ. L. REV. 265, 284 (1994).

Circuit, too, had adopted a rule consistent with *Kodak* even before this Court decided that case. However, other circuits, and in this case a different panel of the Ninth, have disregarded or purported to distinguish *Kodak* and held that the *Matsushita* standard applies *irrespective* of whether the plaintiff's theory is plausible or rests on procompetitive conduct. Some have imposed standards even more stringent than that articulated in *Matsushita*, making it virtually impossible for a plaintiff to withstand summary judgment in a circumstantial evidence case.

Enforcement of the antitrust laws is crucial to the integrity of domestic markets. Without it, anticompetitive activities such as the price fixing and volume allocation conspiracy in this case, which drive up the prices of literally thousands of products purchased by American businesses and consumers, would be allowed to go undeterred and unremedied. Indeed, large-scale anticompetitive cartels between major international companies like those involved in this case have flourished in recent years, as the criminal prosecutions and civil litigation involving lysine, fructose, potash and vitamins (to name a few) show.[9]

Although the criminal division of the Justice

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[9]*See* Klein Statement, *supra*, at 3-4 (massive international cartels in "citric acid, lysine (important livestock and poultry feed additive), sodium gluconate (industrial cleaner), and graphite electrodes (used in steel making)); *see, e.g.*, *In re Methionine Antitrust Litig.*, MDL No. 1311, 1999 U.S. Dist. LEXIS 19206, at *1-2 (J.P.M.L. Dec. 8, 1999) (amino acid used in animal feed); *In re Vitamin Antitrust Litig.*, MDL No. 1285, 1999 U.S. Dist. LEXIS 8599, at *1-2 (J.P.M.L. June 7, 1999), 1999 U.S. Dist. LEXIS 12405, at *1-4 (D.D.C. July 29, 1999) (vitamins, vitamin derivatives, and vitamin premixes); *Blomkest Fertilizer, Inc. v. Potash Corp., Inc.*, 176 F.3d 1055, 1074 (8th Cir. 1999), *reh'g en banc granted* (July 16, 1999) (mineral used in agricultural fertilizers); *In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 602-03 (7th Cir. 1997) (prescription drugs); *In re Abbott Labs. Antitrust Litig.*, 51 F.3d 524, 525 (5th Cir. 1995) (infant formula); *In re Medical X-Ray Film Antitrust Litig.*, No. CV 93-5904, 1997 U.S. Dist. LEXIS 21936, at *2-3 (E.D.N.Y. Dec. 10, 1997) (x-ray film); *In re Plastic Cutlery Antitrust Litig.*, No. 96-CV-728, 1998 U.S. Dist. LEXIS 3628, at *3-4 (E.D. Pa. March 20, 1998) (plastic cutlery).

Department has devoted one third of its staff to investigating such international cartels and has succeeded in prosecuting a number of companies involved in them, it has described those prosecutions as reaching "just the tip of the iceberg." Klein Statement, *supra*, at 4. As this Court has recognized, in enacting the antitrust laws Congress intended that private lawsuits would serve "as a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979).[10]

The confusion over the summary judgment standard and the willingness of many lower courts to dismiss antitrust cases at the summary judgment stage despite credible evidence of a violation deter private lawsuits and undermine effective enforcement of the antitrust laws. This is particularly so with respect to violations that span international borders. The increased complexity of such cases, in which key witnesses and documents are often located beyond U.S. subpoena power, makes them extremely difficult and expensive to prove. When the vagaries of an ill-defined summary judgment standard are added to these hurdles, international conspiracy cases become extremely unattractive to bring unless the Justice Department has already investigated and prosecuted them successfully.

Yet international cartels "pose an even greater threat to American businesses and consumers than domestic conspiracies, because they tend to be highly sophisticated and extremely broad in their impact—both in terms of the geographic scope and in the amount of commerce affected by the conspiracy." *Prepared Testimony of Joel I. Klein Before the Subcomm. On Antitrust of the Senate Comm. On the Judiciary*, FED. NEWS SERV., Feb. 26, 1998, at 5.

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[10] *Accord, California v. American Stores Co.*, 495 U.S. 271, 284 (1990); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 635 (1985); *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 572-73 n.10 (1982).

Effective enforcement of the antitrust laws against companies whose activities affect U.S. markets is "central to the functioning of our economy." *Id.* at 1; *see also United States v. Nippon Paper Indus. Co.*, 109 F.3d 1, 3-4 (1st Cir. 1997), *cert. denied*, 522 U.S. 1044 (1998).

For these reasons, the Court should grant review in this case to resolve the split between the circuits and to clarify that the conventional summary judgment standard applies in antitrust cases not predicated on implausible theories or procompetitive behavior, and that the more stringent test articulated in *Matsushita* applies only in cases asserting implausible claims based on procompetitive activities.

I.

THE NINTH CIRCUIT PANEL ADOPTED AND APPLIED A SUMMARY JUDGMENT STANDARD THAT IS INCONSISTENT WITH THIS COURT'S HOLDING IN *KODAK*.

A. In *Kodak*, This Court Clarified *Matsushita*, Stating That An Extraordinary Showing Was Required Of The Plaintiffs In That Case Because Their Antitrust Theory Was "Economically Senseless" And Predicated On Beneficial Procompetitive Conduct.

In *Matsushita*, this Court addressed the summary judgment standard in the context of an alleged predatory pricing conspiracy. Since the plaintiffs' theory—that the defendants charged below-cost prices for an extended period on the uncertain hope of future profits derived from driving competitors out of the market—"ma[de] no economic sense,"[11] the Court held that the plaintiffs were required to

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[11]Indeed, the Court found that the defendants "as presumably rational businesses, . . . had every incentive *not* to engage in the conduct with which they [were] charged, for its likely effect would be to generate losses for [defendants] with no corresponding gains." 475 U.S. at 595.

"come forward with more persuasive evidence in support of their claim than would otherwise be necessary." 475 U.S. at 587. The Court also held that to withstand summary judgment the plaintiff was required to "show that the inference of conspiracy [was] reasonable in light of the competing inferences of independent action." *Id.* at 588.

The Court emphasized that "court[s] should not permit factfinders to infer conspiracies when such inferences are implausible, because the effect of such practices is often to deter procompetitive conduct." *Id.* at 593. Deterring procompetitive conduct was a concern in *Matsushita* because the conduct that formed the basis of the plaintiffs' complaint—"cutting prices in order to increase business"—"often is the very essence of competition." *Id.* at 594. As the Court observed, "mistaken inferences in cases such as this one are especially costly, because they chill the very conduct the antitrust laws are designed to protect." *Id.* The Court found the balance between the concern about deterring procompetitive conduct and the desire to identify and punish illegal conspiracies "unusually one-sided" in *Matsushita* (*id.* at 594), in which the defendants "had no rational economic motive to conspire." *Id.* at 595-96. It therefore required the plaintiffs to present "evidence that is sufficiently unambiguous to permit a trier of fact to find that petitioners conspired to price predatorily for two decades despite the absence of any apparent motive to do so." *Id.* at 597. Such evidence, the Court held, "must 'ten[d] to exclude the possibility' that [defendants] underpriced [plaintiffs] to compete for business rather than to implement an economically senseless conspiracy." *Id.* at 597-98.

Following *Matsushita*, many lower courts read this Court's opinion very broadly, in one commentator's words: "view[ing] [its] bold language as an invitation to unconventionally examine plaintiffs' theories critically at an early

stage of the litigation."[12] Some interpreted *Matsushita* as holding that a special summary judgment standard applied in all antitrust cases[13]; many interpreted *Matsushita* to require that they weigh and choose between inferences of conspiracy or other unlawful conduct drawn from circumstantial evidence proffered by plaintiffs and inferences or evidence proffered by defendants to show their conduct was lawful.[14]

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[12]Judson, *Note: Kodak v. Image Technical Services: The Taming Of Matsushita And The Chicago School*, 1993 WIS. L. REV. 1633, 1664 (Nov./Dec. 1993); *see* 1 ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 827-28 (4th ed. 1997); Calkins, *Supreme Court Antitrust 1991-92: The Revenge of the Amici*, 61 ANTITRUST L.J. 269, 298 (1993); DeSanti & Kovacic, *Matsushita: Its Construction and Application by the Lower Courts*, 59 ANTITRUST L.J. 609, 653 (1991); Susman, *Plaintiff's Strategies and Tactics—Pretrial and Trial*, 58 ANTITRUST L.J. 277, 277 (1989); H. HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE §16.8b (1994).

[13]2 I. SCHER, ANTITRUST ADVISOR §10.35, at 10-80 (4th ed. 1998); Katz & Arnold, *Eastman Kodak v. ITS: The Downfall of the Chicago School*, THE COMPUTER LAW., July 1992, at 2-3 (many lower courts accepted interpretation of *Matsushita* as imposing greater burden on plaintiffs in antitrust cases than in other types of cases); Protos, *Kodak v. Image Technical Services: A Setback for the Chicago School of Antitrust Analysis*, 43 CASE W. RES. L. REV. 1199, 1216 (1993); *see, e.g., H.L. Hayden Co., Inc. v. Siemens Med. Sys., Inc.*, 879 F.2d 1005, 1019 (2d Cir. 1989) (referring to "special hurdles" of "Monsanto-Matsushita rule"); *Helicopter Support Sys., Inc. v. Hughes Helicopter, Inc.*, 818 F.2d 1530, 1532-35 (11th Cir. 1987); App. A50 (district court opinion below) (referring to "special rule appl[icable] to the use of circumstantial evidence in antitrust cases"); *see also* Hofer, *The Practitioner Antitrust Law, Remarkable Recovery*, S.F. DAILY J., Dec. 13, 1999, at 5 ("The Court in *Monsanto* and *Matsushita* substantially increased the burden of proof required to prove the conspiracy or unlawful agreement element of Section 1 of the Sherman Act for plaintiffs who rely on circumstantial evidence to prove the unlawful agreement. Consequently, it became much more difficult for plaintiffs to survive summary judgment because most civil litigants do rely on circumstantial evidence").

[14]*See, e.g., Midwest Radio Co. v. Forum Pub. Co.*, 942 F.2d 1294, 1297-98 (8th Cir. 1991) ("When a valid business reason exists for the conduct alleged to be predatory or anti-competitive, that conduct cannot support the inference of a section 2 violation"); *Todorov v. DCH Healthcare Auth.*, 921 F.2d 1438, 1456 (11th Cir. 1991) ("when the defendant puts forth a plausible, procompetitive explanation for his actions, we will not be quick to infer, from circumstantial evidence, that a

(continued . . .)

Further, the courts applied *Matsushita* to choose between conflicting inferences even in cases in which the antitrust theory was neither implausible nor based on conduct that was inherently procompetitive.[15] So frequently were summary judgment motions being granted in antitrust cases that some commentators suggested the lower courts were using *Matsushita* to clear their dockets rather than as a basis for analyzing the merits of antitrust claims.[16]

Six years after deciding *Matsushita*, this Court revisited "the standard for summary judgment in an antitrust controversy." *Kodak*, 504 U.S. at 454. The Court took that opportunity to clarify *Matsushita*, stating it was not intended to emasculate the traditional summary judgment standard or to replace it with a special standard imposing more stringent burdens on plaintiffs in antitrust cases. *Id.* at 468.

In *Kodak*, the Court explained that the plaintiffs' antitrust theory in *Matsushita* "made no practical sense, was 'speculative,' and was not 'reasonable.'" *Id.* at 468 (quoting and citing *Matsushita*, 475 U.S. at 588, 590, 593, 595, 597). It was in *that* context, the Court observed, that it had held the

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(. . . continued)
violation of the antitrust laws has occurred; the plaintiff must present more probative evidence that the law has been violated"); *Market Force, Inc. v. Wauwatosa Realty Co.*, 906 F.2d 1167, 1170, 1173-74 (7th Cir. 1990) (affirming summary judgment where plaintiff's evidence did "not foreclose the conclusion that the competitors were engaged in a conspiracy" and "left open the possibility of independent action," and where "even drawing the inferences in favor of [plaintiff], a conspiracy is not the 'compelling, if not exclusive, rational inference' from the record"); *see also Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 822 F.2d 656, 659-61 (7th Cir. 1989) (summary judgment should be "favored practice" in antitrust actions and rejecting plaintiffs' evidence as "too speculative"); *Parkway Gallery Furniture, Inc. v. Kittinger/Pennsylvania House Group, Inc.*, 878 F.2d 801, 804 (4th Cir. 1989) (requiring "clear evidence" of conspiracy).

[15]*See* cases cited in note 14, *supra*; 2 I. SCHER, ANTITRUST ADVISOR §10.35, at 10-80 (4th ed. 1998); 1 ANTITRUST LAW DEVELOPMENTS, *supra*, at 826-27 & nn.421-23 (and cases cited therein).

[16]*De Santi & Kovacic*, *supra*, 59 ANTITRUST L.J. at 653; Weber, *Summary Judgment After Kodak*, ANTITRUST 10 (Fall/Winter 1992).

case could not go to a jury unless the plaintiffs "came forward with more persuasive evidence to support their theory." *Id.* The Court distinguished the case before it from *Matsushita* because it disagreed with Kodak's contention that the plaintiffs' antitrust theory was "if not impossible, is at least unreasonable." *Id.* at 471; *see id.* at 477-78.

In *Kodak*, the Court also emphasized that the *Matsushita* plaintiffs had "attempted to prove the antitrust conspiracy 'through evidence of rebates and other price cutting activities'" that are "'the very essence of competition.'" *Id.* at 478. In that context, the Court had been "concerned that mistaken inferences would be 'especially costly' and would 'chill the very conduct the antitrust laws are designed to protect.'" *Id.* In the case before it, however, the Court noted, "the facts . . . are just the opposite. The alleged conduct—higher service prices and market foreclosure—is facially anticompetitive and exactly the harm that antitrust laws aim to prevent." *Id.* Because of the absence of the factors that drove the result in *Matsushita*, the Court held, "Matsushita does not create any presumption in favor of summary judgment for the defendant." *Id.* On the contrary, "[i]n this case, when we weigh the risk of deterring procompetitive behavior by proceeding to trial against the risk that illegal behavior will go unpunished, *the balance tips against summary judgment*." *Id.* at 479 (emphasis added). *Compare id. with Matsushita*, 475 U.S. at 594.

Kodak thus teaches that *Matsushita* does not apply unless the defendant shows that the inferences the plaintiffs seeks to have drawn are unreasonable and are based on conduct that "appears always or almost always to enhance competition." *See id.* at 469, 477, 479.

B. The Ninth Circuit Panel In This Case Disregarded *Kodak*'s Holding That Where The Plaintiffs' Antitrust Theory Is Neither "Economically Senseless" Nor Based On Beneficial Procompetitive Conduct, Ordinary Summary Judgment Standards Apply.

In this case, the Ninth Circuit panel applied a broadly construed version of the *Matsushita* standard that allowed it to weigh and choose between the Plaintiffs' and Defendant's evidence in a case in which there was an admitted price fixing and volume allocation conspiracy and the issue was whether the Defendant participated in it. As discussed above, the evidence showed not only parallel pricing by the defendant (Cargill), but also actual price fixing and allocation of accounts by Cargill with an Admitted Conspirator (ADM), the highly suspect decision by an Admitted Conspirator (H&R) to refrain from competing for market share with other Admitted Conspirators *and Cargill*,[17] extraordinary efforts by the Admitted Conspirators to recruit Cargill to join a trade association (and changing of its bylaws to allow Cargill, a non-European producer, to join) that was, at minimum, used as a cover for conspiratorial activities, and Cargill's announcement that it would join in that association and simultaneous and dramatic rollback of a publicly announced expansion of capacity. Regardless of Cargill's proffered explanations for some of these facts, it could not be said that drawing an inference from them that Cargill joined in the conspiracy is unreasonable. The only way the court could reach the result that it did was by applying a summary judgment standard different from that applicable in ordinary cases: one consistently crediting the defendant's proffered

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[17]Other courts have held that a company's decision to refrain from competing for a competitor's accounts constitutes a "plus factor" that tends to exclude the possibility of independent conduct and support an inference of conspiracy. *See, e.g., City of Tuscaloosa v. Harcros Chemicals, Inc.*, 158 F.3d 548, 572-73 & n.36 (11th Cir. 1998), *cert. denied*, 145 L. Ed. 2d 42 (1999); *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co.*, 998 F.2d 1224, 1245, 1246 (3d Cir. 1993).

explanations against reasonable competing inferences of conspiracy.

In engaging in such a weighing and choosing between the evidence under the auspices of *Matsushita*, the Ninth Circuit panel at first disregarded *Kodak* entirely. *See* pp.9-10, *supra*. In its published opinion, it made no effort to explain why the analysis prescribed in *Kodak* did not apply. It did not determine either that Plaintiffs' theory (that Cargill participated in the conspiracy) was "economically senseless" or that Cargill's conduct was inherently procompetitive. As a result of overlooking *Kodak*, the panel applied a summary judgment standard that this Court, in *Kodak*, held should *not* be applied in a case like this.

The panel's decision is directly contrary to *Kodak*. *First*, in failing to address whether the conspiracy alleged by the Plaintiffs was implausible, the Ninth Circuit applied a stringent version of the *Matsushita* standard when a necessary precondition to *Matsushita*'s application was not established. *Second*, the court neglected to consider whether a second precondition to *Matsushita* was met: whether the conduct of Cargill on which Plaintiffs' claim was based was procompetitive—*i.e.*, "appear[ing] always or almost always to enhance competition." 504 U.S. at 479. Under *Kodak*, unless the plaintiffs' theory is "economically senseless" and the conduct from which an inference of conspiracy is sought to be drawn is inherently procompetitive, the ordinary summary judgment standard must be applied. *See* pp.17-18, *supra*.

Neither of these preconditions for invoking *Matsushita*'s burden-shifting analysis existed in this case. Unlike the predatory pricing conspiracy alleged in *Matsushita*, a price-fixing and volume allocation conspiracy among the predominant manufacturers of a commodity like citric acid is not implausible; indeed, it is undisputed such a conspiracy took place between at least the five Admitted Conspirators. Nor can it be said that Cargill's participation—any more than ADM's, H&R's, JBL's, HLR's, and

later Cerestar's—was lacking a rational motive. To be sure, each would have to trade the ability to compete for more market share; but in exchange each would receive (1) a certain market share for which the other conspirators would not compete *and* (2) the benefit of steadily increasing above-market prices.

Further, the conduct by Cargill on which Plaintiffs relied to support an inference that it joined the conspiracy was not procompetitive in any sense. Charging above-market prices in tandem with the Admitted Conspirators cannot be characterized as procompetitive. Nor can Cargill's rigging of bids with Admitted Conspirator ADM. Likewise, it cannot be said that rolling back a previous, publicly announced expansion of capacity is "always or almost always [likely] to enhance competition."

Since neither the conspiracy nor Cargill's joinder of it was "economically senseless," and since Cargill's conduct was not inherently procompetitive, the Ninth Circuit erred in applying a stringent summary judgment standard derived from *Matsushita* and in weighing Cargill's proffered explanations of the facts against the competing reasonable inferences of conspiracy that could be drawn from Plaintiffs' evidence. This error will have grave consequences if not corrected: by neglecting to mention the *Kodak* case in its published opinion and failing to apply the summary judgment standard it prescribed, the panel sent a signal to all of the District Courts in this Circuit and beyond that, in its view, *Kodak* has no meaning and a stringent *Matsushita*-based summary judgment standard applies in all antitrust cases, making it virtually impossible for a circumstantial evidence case ever to survive summary judgment.

In its unpublished order denying rehearing, the panel finally acknowledged *Kodak* but sought to distinguish it, implying that a different summary judgment standard applies to tying and monopolization claims than to antitrust conspiracy claims. *See* App. A67-A68. But in *Kodak* this Court made plain that it was addressing "the standard for summary

judgment *in an antitrust controversy*" (504 U.S. at 454 (emphasis added))—not merely in a tying or monopolization context. If the Court had viewed the summary judgment standard for tying and monopolization claims as different from that applicable to conspiracy claims, it could simply have distinguished *Matsushita* on that ground. Instead, it revisited *Matsushita* and took great pains to explain the meaning and limits of its decision in that case. The North Circuit panel's summary dismissal of *Kodak* on the spurious ground that it was distinguishable only exacerbated the problem created by its published opinion.

II.

THERE IS A SHARP CONFLICT BETWEEN THE CIRCUITS CONCERNING THE STANDARD GOVERNING SUMMARY JUDGMENT IN ANTITRUST CASES.

A. The Third And Seventh (And Until Recently, Ninth) Circuits Have Followed *Kodak* And Held That Plaintiffs Need Only Make The Extraordinary Showing Demanded In *Matsushita* Where The Antitrust Claims Asserted Are Implausible And Based On Inferences Drawn From Beneficial Procompetitive Conduct.

The Third and Seventh (and until this case Ninth) Circuits have heeded *Kodak*. In *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co.*, 998 F.2d 1224 (3d Cir. 1993), the Third Circuit considered the summary judgment standard applicable in antitrust cases in light of *Matsushita* and *Kodak*. *Petruzzi's* involved an alleged conspiracy to allocate customers in the fat and bone rendering industry. The customers were suppliers of raw materials, and it was alleged that the defendants conspired to avoid competing for accounts so as to keep the prices they paid the supplier-customers for raw materials artificially low.

Despite the circumstantial evidence plaintiffs had proffered to show that the defendants were engaged in such a conspiracy, the district court had granted summary judgment holding that evidence insufficient. *Id.* at 1229-30.

Reversing, the Court of Appeals addressed the summary judgment standard applicable in antitrust cases. *Id.* at 1230. In general, it observed, "'[a] non-movant's burden in defending against summary judgment in an antitrust case is no different than in any other case.'" *Id.* Further, it opined, "where the non-movant has put forward evidence which it contends allows for an inference of a section 1 violation, the movant defendant bears the burden of proving that drawing an inference of unlawful behavior is unreasonable." *Id.* In determining which inferences are reasonable and which are circumscribed, the court found it important to "examine closely the Supreme Court's decision in *Matsushita*." *Id.*

The Third Circuit found significant to this Court's decision in *Matsushita* this Court's (1) conclusion "that the defendants had no motive to engage in the alleged conspiracy," and (2) observation "that the alleged unlawful behavior was equally consistent with lawful behavior because 'cutting prices in order to increase business often is the very essence of competition.'" *Id.* at 1231. Thus, the court held,

> "[T]wo important circumstances underlying the Court's decision in *Matsushita* were (1) that the plaintiffs' theory of conspiracy was implausible and (2) that permitting an inference of antitrust conspiracy in the circumstances 'would have the effect of deterring significant procompetitive conduct.' [citing *Petroleum Products*, 906 F.2d at 439]. In particular, the *Matsushita* Court worried that if it allowed mistaken inferences to be drawn from the defendants' price-cutting policies, it would chill procompetitive behavior. *See Matsushita*, 475 U.S. at 594, 106 S. Ct. at 1360. Thus, the Court stated that the acceptable inferences which can be drawn from circumstantial evidence vary with the plausibility of the

> plaintiffs' theory and the dangers associated with such inferences." (*Id.* at 1232)

Citing *Kodak*, the Third Circuit emphasized that *Matsushita* "did not hold that an antitrust defendant is entitled to summary judgment merely by providing an economic theory to justify its behavior" but "simply stressed that to survive summary judgment in the absence of direct evidence or strong circumstantial evidence, a plaintiff must assert a theory that is plausible." *Id.* at 1231. The issue remains whether the inferences sought to be drawn are reasonable, and the focus is not on whether the *defendants* demonstrate a plausible rationale for their behavior, but rather whether the plaintiffs' evidence "'tends to exclude the possibility that the defendants were acting independently.'" *Id.* at 1232. Finally, when the plaintiffs' antitrust theory is not implausible and their inferences do not rest on procompetitive activities, "more liberal inferences from the evidence should be permitted than in *Matsushita* because the attendant dangers from drawing inferences recognized in *Matsushita* are not present." *Id.*

Applying that standard to the case before it, the Third Circuit reversed the district court's grant of summary judgment as to two of the defendants. *Id.* at 1233-47. In so ruling, it contrasted the case before it—in which "the plaintiff's theory of conspiracy [was] not implausible" and "the defendants' challenged activities [were] not procompetitive"—with the case this Court faced in *Matsushita*. *Id.* at 1232. It held the plaintiffs' circumstantial evidence was sufficient to raise a triable issue of fact. *Id.*

In decisions since *Petruzzi's IGA*, the Third Circuit has consistently interpreted *Matsushita* in the light of *Kodak* to impose a higher burden on the non-movant plaintiff on summary judgment in antitrust cases *only* when the plaintiff's theory is implausible and based on pro-

competitive activities by the defendant.[18]

The Third Circuit's interpretation of *Matsushita* was, until the decision in the instant case, similar to that in the Ninth Circuit. In *Petroleum Products*, the Ninth Circuit had similarly held that a court could not grant summary judgment to a defendant when the evidence was plausibly consistent with both inferences of conspiracy and inferences of innocent conduct *unless* drawing the inference would deter procompetitive conduct. 906 F.2d at 437-41. In so holding, it observed that "[i]n *Matsushita*, the Court was unwilling to permit an inference of predatory pricing in part because the Court was concerned about the inference's possible anticompetitive side-effects." *Id.* at 439. The Court's emphasis "on the dangers of permitting inferences from certain types of ambiguous evidence" was "key to the proper interpretation of *Matsushita*." *Id.*

In *Petroleum Products*, the Ninth Circuit held that under *Matsushita* a defendant in an antitrust case based on circumstantial evidence is entitled to summary judgment *only if*: "(1) the defendant's conduct is consistent with other plausible explanations, and (2) permitting an inference of conspiracy would pose a significant deterrent to beneficial procompetitive behavior." *Id.* at 440.[19] Further, the Ninth Circuit has recognized that whether a defendant's proffered explanations for its conduct should be accepted—at least where there is competing evidence—is a question of fact for the jury.[20]

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[18]*See, e.g., In re Baby Food Antitrust Litig.*, 166 F.3d 112, 124 (3d Cir. 1999); *Rossi v. Standard Roofing, Inc.*, 156 F.3d 452, 466-67, 474 (3d Cir. 1998); *Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996, 1001 (3d Cir. 1994); *Advo, Inc. v. Philadelphia Newspapers, Inc.*, 51 F.3d 1191, 1196-97, 1205 (3d Cir. 1995).

[19]*See also Long Beach v. Standard Oil Co.*, 872 F.2d 1401, 1407 (9th Cir. 1989) (distinguishing *Matsushita* on ground that case before it was not based on "legitimate price competition" and did not involve "implausible" scheme).

[20]*See Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1477 (9th Cir.

(continued . . .)

As discussed above, the Ninth Circuit's decision in this case conflicts with *Kodak* and with *Petroleum Products*. The intracircuit conflict underscores the confusion in the lower courts about the meaning of *Matsushita*.

The Seventh Circuit, like the Third and formerly the Ninth, applies conventional summary judgment standards if the plaintiff's theory is plausible. In *JTC Petroleum Co. v. Piasa Motor Fuels, Inc.*, 190 F.3d 775, 778-79 (7th Cir. 1999), Chief Judge Posner described *Matsushita* as "teach[ing] that an antitrust claim which makes no economic sense can on that ground be dismissed on summary judgment" and held that even if there was "an innocent explanation for" the defendant's conduct, the issue on summary judgment was "whether a rational jury . . . could conclude (construing the evidence as favorably to the plaintiff as the record permits) that the reason for the [defendants' acts] was that they were [conspiring]." *Id.*

In another case, Chief Judge Posner reversed a district court's grant of summary judgment in an antitrust conspiracy case, rejecting the contention that defendants' proffered innocent explanations entitled them to summary judgment, opining:

> "But the issue before us is not whether the wholesalers were in fact participants in the price-fixing conspiracy; it is whether there is sufficient evidence of this to create a triable issue. In deciding this question we must construe the evidence as favorably to the plaintiffs as the record permits, not as favorably to the defendants as it permits. The defendants' interpretations may be correct; they are not inevitable." (*In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 614 (7th Cir. 1997), *cert. denied*, 522 U.S. 1153 (1998))

(. . . continued)
1997), *aff'd*, 525 U.S. 299 (1999); *High Tech. Careers v. San Jose Mercury News*, 996 F.2d 987, 992 (9th Cir. 1993) (reversing grant of summary judgment).

The court agreed with defendants that summary judgment would be proper even if there were some evidence of an antitrust violation "if the plaintiff's theory of violation makes no economic sense." *Id.* But in the case before it, there was a plausible conspiracy theory. *Id.* Whether it was true or not was "not the issue"; the question (which the court answered in the affirmative) was whether there was "enough evidence supporting it to preclude summary judgment." *Id.* In this context, the defendants' contrary evidence suggesting that they had not played a role in the conspiracy did "not erase the factual question of whether [they] joined the conspiracy. It is just evidence to be weighed in the balance by the trier of fact." *Id.* at 615; *see also id.* at 616.

B. Like The Ninth Circuit Panel In This Case, Courts In Other Circuits Have Chosen To Ignore *Kodak* And Continued To Read *Matsushita* As Requiring Plaintiffs' Evidence To Outweigh Defendants' Evidence To Survive Summary Judgment In All Antitrust Cases.

In stark contrast to the analysis of the Third and Seventh Circuits—and the former position of the Ninth—are the Ninth Circuit's decision in this case and recent decisions of the Fourth, Eighth and Sixth Circuits. Even after *Kodak*, these circuits have interpreted *Matsushita* to require weighing of evidence on summary judgment motions in antitrust cases and entry of summary judgment when the court views the evidence as in equipoise or favoring defendant. Disregarding *Kodak*, these circuits have applied this standard in *all* cases, regardless of the plausibility of the conspiracy theory alleged or whether the conduct at issue is procompetitive.

One example is the Fourth Circuit, which, citing *Matsushita*, held that "on summary judgment motions in antitrust cases, . . . when there is evidence of conduct *that is consistent with both legitimate competition and an illegal*

conspiracy, courts may not infer that an illegal conspiracy has occurred without other evidence." *Thompson Everett, Inc. v. National Cable Advertising, L.P.*, 57 F.3d 1317, 1323 (4th Cir. 1995) (citing *Matsushita* and omitting to mention *Kodak*) (emphasis added); *see also Merck-Medco Managed Care, LLC v. Rite Aid Corp.*, No. 98-2847, 1999 U.S. App. LEXIS 21487, at *21-22 (4th Cir. Sept. 7, 1999) (*Eastman Kodak* did not modify *Matsushita*). The Fourth Circuit standard goes *beyond Matsushita*: (1) The high threshold it sets for plaintiffs is not limited to situations in which the plaintiff's theory is inherently "implausible" or "economically senseless," or to cases in which the conduct complained of is procompetitive (such as price-cutting), but is established for all antitrust cases. (2) Even in *Matsushita*, the Court did not suggest that any plausible explanation proffered by the defendant for its conduct would entitle the defendant to summary judgment, but held only that where the inferences of conspiracy and innocence from particular conduct were *equally* plausible, the inference of conspiracy could not be drawn without more evidence (*Matsushita*, 475 U.S. at 588). Under the Fourth Circuit standard, if the conduct can be explained and thus an inference of innocence is even *possible*, the court is *required* to draw it. (3) Only if the plaintiff proffers evidence that not merely "tends to exclude" but, in the court's view *conclusively* excludes, the possibility of innocent conduct is there a triable issue of fact. The Fourth Circuit reading of *Matsushita* substitutes the judge for the jury and requires that the claim be dismissed whenever a jury *could* find for the defendant—even if it could also rationally find for the plaintiff.

Similarly, the Eighth Circuit has expressly rejected the Third and former Ninth Circuit approach, stating that it "read[s] *Matsushita* more broadly." *Corner Pocket of Sioux Falls, Inc. v. Video Lottery Techs., Inc.*, 123 F.3d 1107, 1109 (8th Cir. 1997), *cert. denied*, 522 U.S. 1117 (1998). In *Corner Pocket*, plaintiffs alleged a conspiracy by a manufacturer and distributors of video lottery equipment to

allocate territories and fix prices. *Id.* The court accepted the defendants' proffered explanations for conduct that suggested an agreement to divide the market and fix prices over plaintiffs' evidence of conspiracy. *Id.* at 1110-14. It candidly acknowledged that it viewed *Matsushita* as requiring it to "weigh the summary judgment evidence of both parties in determining whether plaintiffs' evidence 'tends to exclude the possibility that the alleged conspirators acted independently.'" *Id.* at 1112. Further, reversing the ordinary summary judgment principle that inferences are drawn in favor of the nonmoving party, the court applied the opposite presumption, stating it could "not lightly disregard" "legitimate business reasons" the moving defendants gave for their business practices. *Id.* Going still further in preferring the defendants' evidence over the plaintiffs, the court discounted each item of evidence the plaintiffs offered as "too ambiguous" even when it reasonably supported an inference of conspiracy. *See id.* at 1112-14.

The Eighth Circuit has thus endorsed a summary judgment standard that entails weighing the plaintiff's evidence against the defendant's and giving the defendant the benefit of a presumption of lawfulness that can only be rebutted by evidence for which it is impossible even to *conceive* of an innocent explanation. *See id.*; *see also Lovett v. General Motors Corp.*, 998 F.2d 575, 579 (8th Cir. 1993).

The Sixth Circuit has likewise interpreted *Matsushita* to mean that the plaintiff in an antitrust case, to withstand summary judgment, "has the burden of showing that the evidence is *more* consistent with conspiracy than with independent action." *See Super Sulky, Inc. v. United States Trotting Ass'n*, 174 F.3d 733, 739 (6th Cir.), *cert. denied*, 145 L. Ed 2d 146 (1999) (emphasis added). The Sixth Circuit in that case rejected the plaintiff's circumstantial evidence because it "d[id] not exclude a non-conspiratorial explanation for the [group's] action." *Id.* In applying this standard, the court discussed *Matsushita*, but made no mention of *Kodak*. The Sixth Circuit standard, like the Fourth's and Eighth's, is

applied without regard to whether the plaintiff's theory is implausible or based on procompetitive conduct. It similarly substitutes judge for jury: the judge decides whose evidence is strongest (is the evidence "more consistent" with the plaintiff's theory of an antitrust violation or the defendant's theory of innocence?) and, if the judge decides the defendant's evidence is weightier, grants summary judgment.

The courts that, like the Fourth, Eighth and Sixth Circuit, have continued to read *Matsushita* as allowing, or indeed mandating, that courts determine not merely which inferences are permissible from the evidence, but which are stronger, represent a drastic departure from the ordinary summary judgment standard and a serious incursion on antitrust plaintiffs' seventh amendment right to a jury trial. They also ignore this Court's holding in *Kodak* that the high threshold established for the plaintiff in *Matsushita* was intended to apply only in cases in which the plaintiff's theory is implausible and would necessitate inferring conspiracy from procompetitive behavior.

CONCLUSION

This Court should grant certiorari and confirm that it meant what it said in *Kodak* and that the lower courts *must*—absent the extraordinary circumstances present in *Matsushita*—apply the ordinary summary judgment standard in antitrust cases.

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Respectfully,

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